Tee Ah Kow v Wisma Enhua Realty Sdn Bhd

HIGH COURT (MUAR) — CIVIL SUIT NO 22–49 OF 1999
JEFFREY TAN J
15 JULY 2004

Contract — Sale and purchase of property — Liquidated damages — Vacant possession — Plantiffs paid full purchase price — Defendant delivered possession of units late — Whether cl 22 of contract applied — Whether possession should be delivered 36 months after agreement — Whether cl 23 of contract applied — Whether possession should be delivered after full purchase price paid — Damages to be paid

This was one of five actions by five different purchasers ('plaintiffs') against the defendant for (i) an order that the defendant perform the contracts of sale between the defendant and the plaintiffs with respect to eight units of condominium, (ii) damages and (iii) costs. It was agreed that this decision would bind the other actions.

The defendant engaged by contract Fortune Sector Sdn Bhd ('FS') to complete the condominium in consideration of RM9,332,498. It was agreed, by an agreement dated 9 February 1999, that FS shall accept eight units of condominium in lieu of the progress payment of RM1,161,075.60 towards account of the final balance sum payable on the contract sum. FS nominated the plaintiff as purchasers of those units and the plaintiffs and defendants entered into eight agreements in the form prescribed in Sch H of the 1989 Regulations made under the Housing Developers (Control and Licensing) Act 1966. The defendant had delivered the units to the plaintiffs, so the issue before the court was the claim for damages for late delivery.

Counsel for the plaintiff stated that the issue was whether cl 22 of the agreement applied. Counsel for the defendant stated that the plaintiffs must accept the agreement as they found it and that cl 22 applied, ie vacant possession of the units should be delivered within 36 months from the agreement. Counsel for the plaintiff then stated that cl 23 should be considered, inter alia, that even without certificate of fitness for occupation, the defendants had to let the plaintiffs into occupation. Counsel for the defendant then stated that cl 22 prevailed over cl 23.

Held, ordering the defendant to pay plaintiffs liquidated damages:

(1) A hypothetical purchaser who had paid the full purchase price had to be given immediate possession, albeit the existence of a cl 22 provision. In the first place, full payment could not be collected without the handing over of vacant possession (reg 11(2) read together with the Third Sch). And there would be a cl 23 provision providing that where the developer had applied for a certificate of fitness for occupation and the purchaser had paid all monies payable in accordance with the Third Sch that *'the developer shall let the purchaser into possession*'. In the instant case, each plaintiff stood in the shoes of that hypothetical

purchaser. Each plaintiff had paid the full purchase price. In each case, the defendant had received the full purchase price. That payment was by way of a set-off of accounts is entirely immaterial. The plain fact of the matter is that value had been given and received in full (see para 9).

(2) Clause 23 provided that the defendant should let the plaintiffs into possession. The defendant applied for certificates of fitness for occupation in respect of those said eight units on 26 August 1999. The contracts of sale were executed on 19 April 1999. The plaintiffs had paid all monies due under the contracts of sale when the defendant applied for certificates of fitness for occupation in respect of those said eight units. According to cl 23, the defendant should let the plaintiffs into possession on 26 August 1999, and not on 11 October 2000 in respect of four units, and not on 14 March 2001 in respect of the balance four units (see para 10).

(3) Effect must be given to all provisions and Schedules. Clause 22 should not be read in isolation. To arrive at the true interpretation of a document, a clause must be considered in the context of the whole of the document. Both cll 22 and 23 could be easily reconciled. While cl 22 gave 36 months to the defendant to complete the building works, cl 23 provided that in the event the defendant had applied for certificates of fitness for occupation and the plaintiffs had paid all monies due under the contract of sale the defendant shall let the plaintiffs into possession. But cl 22 had been overtaken by events. Certificates of fitness for occupation had been applied for and all monies due had been paid. Clause 23 came into play on 26 August 1999 (see para 11).

(4) It was ordered that the defendant pay to the plaintiffs liquidated damages calculated from 26 September 1999 (one month was given to the defendant to comply with cl 23) to 11 October 2000 (with respect to four units), or to 14 March 2001 (with respect to the balance four units), all at the rate of 10%pa of the purchase price, (ii) interest on the respective judgment sums at the rate of 8%pa from 26 September 1999 to date of satisfaction, and (iii) costs (see para 13).

[Bahasa Malaysia summary

Ini adalah satu daripada lima tindakan oleh lima pembeli berlainan ('plaintif-plaintif') terhadap defendan untuk (i) satu perintah bahawa defendan melaksanakan perjanjian beli di antara defendan dan plaintif-plaintif berkait dengan lapan unit kondominium, (ii) ganti rugi dan (iii) kos. Ia telah dipersetujui bahawa keputusan ini akan mengikat tindakan lain.

Defendan telah melantik, melalui perjanjian, Fortune Sector Sdn Bhd ('FS') untuk menyiapkan kondominium untuk balasan RM9,332,498. Ia telah dipersetujui, melalui satu perjanjian bertarikh 9 Februari 1999, bahawa FS akan menerima lapan unit kondominium sebagai ganti bayaran

ansuran RM1,161,075.60 untuk bayaran terakhir pada jumlah di dalam perjanjian itu. FS telah melantik plaintif-plaintif sebagai pembeli unit-unit itu dan plaintif-plaintif dan defendan-defendan memasukki lapan perjanjian di dalam borang yang diperuntukkan di dalam Jadual H Peraturan 1989 yang dibuat di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966. Defendan telah memberi unit-unit itu kepada plaintif-plaintif, dan isu di hadapan mahkamah adalah untuk tuntutan ganti rugi untuk penyampaian lewat.

Peguam pihak plaintif menyatakan bahawa isu adalah sama ada kl 22 perjanjian itu terpakai. Peguam defendan telah menyatakan bahawa plaintif-plaintif mesti menerima perjanjian seperti yang sedia ada dan kl 22 terpakai, iaitu milikan kosong unit-unit itu mesti diberi di dalam tempoh 36 bulan daripada tarikh perjanjian itu. Peguam plaintif kemudiannya menyatakan bahawa kl 23 patut dipertimbangkan, antara lain, walaupun sijil kelayakan penghunian belum dikeluarkan, defendan-defendan mesti memberikan milikan kepada plaintif-plaintif. Peguam bagi pihak defendan menyatakan bahawa kl 22 mengatasi kl 23.

Diputuskan, memerintahkan defendan membayar ganti rugi jumlah tertentu kepada plaintif-plaintif:

(1) Seorang pembeli hipotesis yang telah membayar harga penuh perlu diberi milikan dengan segera, walaupun terdapat kl 22. Pertamanya, bayaran penuh tidak dapat dikumpul tanpa pemberian milikan kosong (peraturan 11(2) dibaca bersama Jadual Ketiga). Dan akan terdapat peruntukan kl 23 memperuntukkan bahawa di mana pembangun telah memohon satu sijil kelayakan penghunian dan pembeli telah membayar segala wang yang perlu dibayar mengikut Jadual Ketiga, '*the developer shall let the purchaser into possession*'. Di dalam kes ini, setiap plaintif seakan-akan pembeli hipotesis itu. Setiap plaintif telah membayar harga penuh. Di dalam setiap kes, defendan telah menerima bayaran penuh. Bahawa bayaran telah dibuat melalui tolakan akaun adalah tidak material. Fakta adalah nilai telah diberi dan diterima dengan penuh (lihat perenggan 9).

(2) Klausa 23 memperuntukkan bahawa defendan mesti memberi plaintif-plaintif milikan. Defendan telah memohon untuk sijil kelayakan penghunian berkait dengan lapan unit pada 26 Ogos 1999. Perjanjian-perjanjian beli telah dilaksanakan pada 19 April 1999. Plaintif-plaintif telah membayar segala wang yang perlu dibayar di bawah perjanjian beli apabila defendan memohon untuk sijil kelayakan penghunian berkait dengan lapan unit itu. Menurut kl 23, defendan patut memberikan milikan kepada plaintif-plaintif pada 26 Ogos 1999 dan bukan pada 11 Oktober 2000 berkait dengan empat unit, dan bukan pada 14 Mac 2001 berkait dengan empat unit yang lain (lihat perenggan 10).

(3) Semua peruntukan dan jadual mesti dikuatkuasakan. Klausa 22 tidak patut dibaca sendiri. Untuk mendapatkan taksiran sebenar dokumen, klausa mesti dipertimbangkan di dalam konteks seluruh dokumen itu. Kedua-dua kll 22 dan 23 dapat diselaraskan. Klausa 22 memberi 36 bulan kepada defendan untuk menyelesaikan kerja-kerja pembinaan dan kl 23 memperuntukkan bahawa jika defendan telah memohon sijil kelayakan penghunian dan plaintif-plaintif telah membayar segala wang yang perlu dibayar di bawah perjanjian jualan defendan mesti memberikan milikan kepada plaintif-plaintif. Akan tetapi kl 22 telah diatasi oleh keadaan. Sijil kelayakan penghunian telah dipohon dan segala wang yang perlu dibayar telah dibayar. Klausa 23 terpakai pada 26 Ogos 1999 (lihat perenggan 11).

(4) Telah diperintahkan bahawa defendan membayar kepada plaintif-plaintif ganti rugi jumlah tertentu ditaksirkan daripada 26 September 1999 (defendan telah diberikan satu bulan untuk mematuhi kl 23) kepada 11 Oktober 2000 (berkait dengan empat unit), atau ke 14 Mac 2001 (berkait dengan empat unit yang lain), semua pada kadar 10% setahun daripada harga belian itu, (ii) faedah pada kadar 8% setahun daripada 26 September 1999 kepada tarikh penyelesaian, dan (iii) kos (lihat perenggan 13).]

Notes

For cases on liquidated damages for sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4394–4396.

Tan Koon Heo (Soh Yook Lam & Co) for the plaintiff.
GF Nelson (GF Nelson & Co) for the defendant.

Jeffrey Tan J:

[1] This is but one of five similar actions (others being Muar High Court 22–50–1999, Muar High Court 22–51–1999, Muar High Court 22–52–1999, and Muar High Court 23–104–1999) by five different 'purchasers' (plaintiffs) that commenced as actions against Wisma Enhua Realty Sdn Bhd ('defendant') for (i) an order that the defendant do specifically perform the respective contracts of sale entered into between the defendant as vendor of the one part and the plaintiffs as 'purchasers' of the other part, with respect to eight units of condominiums in a condominium block known as Ruby Condominium, Muar, and developed by the defendant, (ii) damages and (iii) costs.

[2] In all five actions, Mr Tan Koon Heo appeared for the plaintiff, while Mr GF Nelson appeared for the defendant. On the occasions when this action was called for hearing, both learned counsel affirmed that the decision in the instant case, namely Muar High Court 22–49–1999, should bind the other four actions. That came as no surprise. All five actions share the same

background facts. All statements of claim and all statements of defence agree that the defendant, by an agreement dated 30 May 1997, engaged one Fortune Sector Sdn Bhd ('FS') to construct and complete the said Ruby Condominium, in consideration of the contract sum of RM9,332,498. Suffice it to say that it is no longer in dispute that by agreement dated 9February 1999, FS and the defendant agreed that FS shall accept eight units of condominium (namely units 01-05, 06-07, 04-08, 03-10, 04-11, 03-11, 04-12, and 02-13) in lieu of the progress payment of RM1,161,075.60 and towards account of the final balance sum payable on the aforesaid contract sum. It is also no longer in dispute that FS nominated the plaintiff who were their building material suppliers, as purchasers of those eight units, and that the plaintiffs and defendant then entered into eight separate agreements, all dated 19 April 1999 and in the form prescribed in Sch H of the 1989 Regulations made under the Housing Developers (Control and Licensing) Act 1966, with respect to the sale and purchase of those said eight units. And both learned counsel affirmed that an order for specific performance is no longer in issue, as the defendant had delivered all said eight units to the plaintiffs (four units on 11 October 2000 and four units on 14 March 2001), and that the only outstanding issue is the claim for damages for late delivery.

[3] At the close of the entire case, that is after the testimony of three witnesses (PW1, PW2 & DW1), Mr Tan said, 'Only issue is whether the three year delivery period applies or whether the three year delivery period does not apply. The result will follow the ruling'.

[4] Mr Nelson confirmed that it was so and then submitted as follows. The plaintiffs could not pick a particular clause, but must accept the agreement as they find it. Clause 22 of the sale and purchase agreement is the specific provision, and *expressio unius exclusio alterius* there is no room for any other provision. There is no ambiguity in cl 22. If it were intended that cl 22 should be inoperative, then it should have been expressly stated.

[5] Mr Tan submitted that the consideration for the said eight units was settled by a set-off between FS and the defendant, and that the court should consider cl 23 of the contracts of sale. It was agreed that the units should be delivered upon full payment. On 26 August 1999, the defendant applied for certificates of fitness for occupation in respect of those said eight units. Clause 23 provided that for occupation the plaintiffs should not occupy the said units without certificaes of fitness for occupation. But even without certificates of fitness for occupation, the defendant must let the plaintiffs into occupation.

[6] Mr Nelson replied that cll 22 and 23 had different purposes, and that cl 22 prevails over cl 23.

[7] The pertinent cll 22 and 23 in all five sale and purchase agreements dated 9 September 1999 read as follows:

Clause 22 — Time for handing over of vacant possession

(1) Vacant possession of the said Parcel to which water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement.

(2) If the Vendor fails to hand over vacant possession of the said Parcel to which water and electricity are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

Clause 23 — Manner of delivery of vacant possession

(1) Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the said parcel has been duly completed and water and electricity supply are ready for connection to the said parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under cl 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this agreement the Vendor shall let the Purchaser in possession of the said parcel.

PROVIDED THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

(2) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

[8] In a typical case, a contract of sale in the form prescribed in Sch H of the Housing Developers (Control and Licensing) Regulations 1989 (all present contracts of sale were in such prescribed form); of a subdivided building should work like this. Save where the building has been completed, a developer sells while a purchaser buys a specified piece of land together with a building that has been approved for construction and or is about or is in the process of being constructed, with a covenant by the developer to deliver the completed building to the purchaser within 36 months from the date of the agreement. The agreed price, whatever it may be, is paid first by a deposit, and then by specified instalments payable upon the completion of specified stages of building works. The Third Sch to the Act specifies both the instalments (being preset percentages of the total purchase price), and the stages of building works. In other words, in a contract of sale in form prescribed in Sch H, the instalments relate directly to the progress of building works. It follows that a purchaser who enters into a contract of sale in the form prescribed in Sch H, with respect to a building already at an advance stage of construction, would have to fork out not just the deposit but also all instalments payable till the stage of completion of building works. Conversely, a developer could not demand payment of the instalments without the attendant stage of

building works. It should be such that the land and the completed building would be handed over to the purchaser by the time that the final instalment of 5% of the purchase price would be tendered by the purchaser to the developer's solicitors.

[9] But the facts here are not that typical. Construction of all eight units were completed by 26 August 1999, as the defendant had applied for certificates of fitness for occupation in respect of those said eight units on 26 August 1999, which the defendant could not reasonably have done so if the eight units were not ready for occupation. And since construction of those eight units had been completed, any other purchaser of any one of those eight units would have to straight away fork out the entire purchase price. But would that hypothetical purchaser have to wait 36 months for the delivery of the completed unit, albeit that he had paid the full purchase? In another situation, such as in the case of a contract of sale between a non-developer vendor and purchaser, and unless otherwise provided, it is normal that a vendor would deliver both possession and good title upon tender of the full purchase price. But in the case of a contract of sale between a developer and purchaser, the contract of sale '*shall be in the form prescribed in Sch H*' (see reg 11(1) of the 1989 Regulations), which would mean that that hypothetical purchaser would yet have to enter into a contract of sale with the defendant in the form prescribed in Sch H, a contract with a cl 22 provision albeit that construction had been completed and the purchaser had paid for it in full. So could that hypothetical purchaser be denied possession of the said unit, on account of the existence of a cl 22 provision providing for vacant possession to be delivered within 36 months from the date of the agreement? It would not seem so that that hypothetical purchaser who had paid the full purchase price could be denied immediate possession, albeit the existence of a cl 22 provision. In the first place, full payment could not be collected without the handing over of vacant possession (see reg 11(2) read together with the Third Sch). And in the next place, there would be a cl 23 provision providing that where the developer had applied for a certificate of fitness for occupation and the purchaser had paid all monies payable in accordance with the Third Sch that '*the developer shall let the purchaser into possession*'. And in the instant case, each plaintiff stood in the shoes of that hypothetical purchaser. Each plaintiff had paid the full purchase price. In each case, the defendant had received the full purchase price. That payment was by way of a set-off of accounts is entirely immaterial. The plain fact of the matter is that value had been given and received in full.

[10] According to the Third Sch, vacant possession should be delivered by the defendant upon receipt of the full purchase price. Perhaps it may not be entirely right to hold the defendant strictly to the provisions of the Third Sch, in view of the fact that receipt of the full purchase price was by way of a set-off of accounts between the defendant and FS, and between FS and the plaintiffs. Even still, there was cl 23 that provided that the defendant should let the plaintiffs into possession. It is an agreed fact the defendant applied for certificates of fitness for occupation in respect of those said eight

units on 26 August 1999. It is also an agreed fact that the contracts of sale were executed on 19 April 1999. It pans out that the plaintiffs had paid all monies due under the contracts of sale when the defendant applied for certificates of fitness for occupation in respect of those said eight units. According to cl 23, the defendant should let the plaintiffs into possession on 26 August 1999, and not on 11 October 2000 in respect of four units, and not on 14 March 2001 in respect of the balance four units.

[11] It was contended that cl 22 is the specific provision and there is no room for cl 23. With respect, effect must be given to all provisions and Schedules (see *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285. Clause 22 should not be read in isolation. To arrive at the true interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document (*Chamber Colliery Co Ltd v Twyerould* [1915] 1 Ch 268). As a corollary of the principle that a document must be construed as a whole, all parts of it must be given effect where possible (*Re Strand Music Hall Co Ltd* (1865) 35 Beav 153) and no part should be treated as inoperative or surplus (*SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd* [1954] 1 WLR 492) unless it is impossible to reconcile it with another and more express clause in the same deed (*Re Strand Music Hall Co Ltd*). And in the case of the instant contracts of sale, both cll 22 and 23 could be easily reconciled. While cl 22 gave 36 months to the defendant to complete the building works, cl 23 provided that in the event the defendant had applied for certificates of fitness for occupation and the plaintiffs had paid all monies due under the contract of sale (DW1, the chairman of the defendant, in his testimony agreed, '*plaintif tidak perlu bayar sebab defendan hutang pada FS*'), the defendant shall let the plaintiffs into possession. But cl 22 had been overtaken by events. Certificates of fitness for occupation had been applied for and all monies due had been paid. And cl 23 came into play on 26 August 1999.

[12] The purpose of cl 22 and the like should be recognised for what it is. The 36 months allowed for delivery of vacant possession is solely on account of what is reckoned is reasonable time needed by a developer to construct and complete the building approved for construction, the underlying rationale being that without time for construction then there would only be contracts of sale of land and completed building. But when it comes to it, where conditions in cl 23 and the like have been met, the developer shall let the purchaser into possession, albeit that the said 36 months have yet to come to an end.

[13] For the above reasons, it is ordered that the defendant do pay to the plaintiffs (i) liquidated damages calculated from 26 September 1999 (one month is given to the defendant to comply with cl 23) to 11 October 2000 (with respect to four units), or to 14 March 2001 (with respect to the balance four units), all at the rate of 10%pa of the purchase price (RM127,681.20, RM178,369.20, RM167,119.20, RM136,681.20, RM141,181.20, RM136,681.20, RM141,181.20 or RM132,181.20, as applicable), (ii) interest on the respective

judgment sums at the rate of 8%pa from 26 September 1999 to date of satisfaction, and, (iii) costs.

Defendant ordered to pay plaintiffs liquidated damages.

Reported by Chew Phye Ken